Chuah Seow Keng & Anor v Rhina Bhar @ Rani Raj Pal

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P–02–458 OF 1995
SHAIK DAUD, AHMAD FAIRUZ AND MOKHTAR SIDIN JJCA
23 JANUARY 1997

***Contract** — Sale and purchase of land — Refusal to complete — Application by purchaser for specific performance — Whether a concluded contract had come into being between parties — Whether purchaser was entitled to specific performance*

The appellants ('the vendors') were the proprietors of a piece of land ('the land'). The respondent ('the purchaser') entered into negotiations to purchase the land from the vendors. After a series of correspondences, the solicitors for the vendors submitted a final draft of the agreed sale and purchase agreement ('the agreement') to the solicitors for the purchaser. The agreement provided, inter alia, that the purchaser shall pay 10% of the agreed purchase price on signing of the agreement and the balance would be paid within four months from the date of the agreement. Pursuant to this, on 15 December 1993, the purchaser through her solicitors sent a cheque for the deposit together with the agreement duly signed by the purchaser to the vendors. On 28 January 1994, the vendors — using their own cheque — returned the deposit to the purchaser. The purchaser claimed for specific performance of the agreement. The vendors alleged at the trial that they had never agreed to sell the land with vacant possession, and the option to sell the land was signed only by the first appellant. The High Court granted specific performance to the purchaser. The vendors appealed. The issue was whether a contract had came into being between the parties and if so whether the purchaser was entitled to specific performance.

Held, dismissing the appeal:

In the circumstances of the case, a contract between the vendors and purchaser had indeed come into effect on 15 December 1993 when the purchaser tendered the requisite deposit to the vendors' solicitors who in turn cashed it and kept the money as stakeholder. The purchaser had thus fulfilled her part of the agreement and it was left to the vendors to do their part. Since the vendors had refused to sign the contract, they had breached the contract, and therefore, the purchaser was entitled to specific performance.

Additionally, the issues raised by the vendors were new issues and, on the facts of the case, were without merit (see pp 20I and 21A–B, I).

[Bahasa Malaysia summary

Perayu-perayu ('penjual') adalah tuan punya sebidang tanah ('tanah tersebut'). Penentang ('pembeli') telah membuat perundingan bagi membeli tanah tersebut daripada penjual. Selepas satu siri surat-

menyurat, peguamcara untuk pembeli mengemukakan suatu deraf muktamad perjanjian jual beli yang disetujui ('perjanjian tersebut') kepada peguamcara pembeli. Perjanjian tersebut memperuntukkan, antara lain, bahawa pembeli haruslah membayar 10% daripada harga belian yang disetujui bila menandatangani perjanjian tersebut dan baki akan dibayar dalam tempoh empat bulan daripada tarikh perjanjian tersebut. Berikutnya, pada 15 Disember 1993, pembeli menerusi peguamcaranya menghantar suatu cek untuk deposit bersama dengan perjanjian tersebut yang ditandatangani oleh pembeli kepada penjual. Pada 28 Januari 1994, penjual — yang menggunakan cek sendiri — memulangkan deposit kepada pembeli. Pembeli menuntut pelaksanaan spesifik perjanjian tersebut. Penjual mengatakan di perbicaraan bahawa mereka tidak pernah bersetuju menjual tanah tersebut dengan milikan kosong, dan opsyen untuk menjual tanah tersebut cuma ditandatangani oleh perayu pertama. Mahkamah Tinggi membenarkan pelaksanaan spesifik kepada pembeli. Penjual merayu. Isu adalah sama ada suatu kontrak telah wujud di antara pihak-pihak dan jika demikian, sama ada pembeli adalah berhak mendapatkan pelaksanaan spesifik.

Diputuskan, menolak rayuan:

Dalam keadaan-keadaan kes, suatu kontrak di antara penjual dan pembeli memang telah berkuatkuasa pada 15 Disember 1993 apabila pembeli mengemukakan deposit yang perlu kepada peguamcara penjual yang pula telah menunaikannya dan menyimpan wang itu sebagai pemegang amanah harta. Maka pembeli telah memenuhi bahagian perjanjiannya dan ianya terbuka kepada penjual untuk melakukan bahagian mereka. Oleh kerana penjual enggan menandatangani kontrak, mereka telah memungkiri kontrak dan oleh itu, pembeli berhak mendapatkan pelaksanaan spesifik.

Tambahan pula, isu-isu yang ditimbulkan oleh penjual adalah isu yang baru dan atas fakta kes, adalah tanpa merit (lihat ms 20I dan 21A–B, I).]

Notes

For cases on sale and purchase of land, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2063–2136.

Case referred to

Filby v Hounsell (1896) 2 Ch 737 (refd)

Daphne Choy (*Shearn Delamore & Co*) for the appellants.
Yu Meng Queng (*Tan Yu & Co*) for the respondent.

Shaik Daud JCA (delivering the judgment of the court): This appeal is from the decision of the Penang High Court which had on 22 June 1995 granted specific performance of a sale and purchase agreement of a piece of land to the respondent. The first and second appellants are and were at

A all material times proprietors of a piece of property known as Lot 87 Section 19, Daerah Timur Laut, Penang with premises erected thereon known as No 11 Love Lane, Penang. The respondent entered into negotiations to purchase the property from the appellants. After a series of correspondences between their solicitors, and the solicitors for the appellants on the terms to be included in the sale and purchase agreement, the B solicitors for the appellants (the vendors) submitted a final draft of the agreed sale and purchase agreement in quadruplicate to the solicitors for the respondent (the purchaser). Inter alia, the agreement provided that the purchaser shall pay 10% of the agreed purchase price on signing of the agreement. The purchase price was agreed at RM300,000. The balance of C RM270,000 was to be paid within four months from the date of the agreement with a further extension of two months subject to interest at the rate of 10% per annum.

Pursuant to this, on 15 December 1993, the respondent through her solicitors sent a cheque for RM30,000 being the deposit and part payment D of the purchase price, together with the sale and purchase agreement (in quadruplicate) duly signed by the respondent. After that, nothing was heard from either the appellants or their solicitors despite two reminder letters sent to the appellants' solicitors. Then by a letter dated 28 January 1994, solicitors for the appellants using their own cheque returned the RM30,000 directly to the respondent without affording any reason. Pursuant E to this, solicitors for the respondent sent a letter dated 3 February 1994 to solicitors for the appellants returning the cheque for RM30,000.

The respondent then filed a writ and statement of claim against the appellants on 25 April 1994 for specific performance, damages and consequential reliefs.

F

It was only after filing the defence did the appellants openly make known the reasons why they did not wish to proceed with the sale. In their statement of defence, inter alia, the appellants stated that they never agreed to sell the property with vacant possession, and secondly that the option to sell the property was signed only by the first appellant. Pursuant G to this, the respondent filed a summons in chambers dated 25 October 1994 for specific performance. The High Court came to a finding that a contract existed between the parties and granted specific performance to the respondent.

The issue in this appeal is whether, in the circumstances of this case, H a contract had come into being between the appellants and the respondent and if so, whether the respondent is entitled to specific performance.

What seems clear is that before the final draft agreement was drawn up, the parties must have entered into negotiations on the terms and conditions of the sale. This is clearly evidenced in this case in the various correspondences tendered by both parties which finally ended in a final I draft containing all the agreed terms and conditions of the sale. The final agreement was submitted by the appellants themselves through their solicitors and this was sent to the solicitors for the respondent in quadruplicate for execution by the respondent. In our view, if all the terms

and conditions of the sale had not been agreed upon, why would the appellants through their solicitors send four copies of the agreement to the respondent's solicitors for execution? The four copies of the sale and purchase agreement, inter alia, provide that:

(a) the purchase price is RM300,000;

(b) deposit to be paid on signing of the sale and purchase agreement is RM30,000;

(c) the balance of the purchase price RM270,000 is to be paid in four months with an extension of two months subject to a payment of 10% interest;

(d) the purchaser is entitled to specific performance; and

(e) the sale of the property is free from any encumbrances.

There is no denial that the respondent had paid the 10% deposit to the appellants' solicitors vide cheque MBB No 996092 on 15 December 1993 and had also signed the sale and purchase agreement in quadruplicate. When there was no response from the appellants' solicitors, the respondent's solicitors wrote two letters dated 28 December 1993 and 28 January 1994 enquiring about the matter. Then vide letter dated 28 January 1994, the appellants' solicitors sent a cheque of their own MBB No 487422 for RM30,000 purporting to return the deposit paid by the respondent and to repudiate the contract without assigning any reason whatsoever for the repudiation. Faced with this sets of facts, we are of the view that the learned judge was right in holding that a contract existed between the appellants and the respondent. In *Filby v Hounsell* (1896) 2 Ch 737, the vendor's name was omitted from the conditions of sale by auction of a house and from the indorsed form of contract to be signed by a purchaser. The house was not sold at the public auction, but subsequently the defendant sent a letter addressed on the face of it to J & Co — who were the auctioneers — offering to purchase the house for £350, and stating that if his offer was accepted, he would 'sign contract on auction particulars'. J & Co replied by letter stating that on behalf of their client (who was the vendor), naming her, they accepted the offer 'subject to contract as agreed. We enclose draft contract'. The draft was identical to the contract embodied in the conditions of sale and endorsement, except that the draft stated the vendor's name, but the defendant never signed it. It was held that as the offer contained the names of both contracting parties (though one was only the agent of an undisclosed vendor), on its acceptance there was a valid contract within the statute of fraud and that the acceptance was absolute and unconditional, in as much as a form of contract definitive in all its terms was identified by the offer and that signatures to the form of contract were unnecessary.

In the present case, the appellants through their solicitors made an offer to sell the property to the respondent who accepted it, signed the sale and purchase agreement in quadruplicate and tendered the requisite 10% by cheque to the appellants' solicitors who in turn cashed it and kept the money as stakeholder. Now, what more need the respondent have done?

A The respondent had fulfilled her part of the agreement and it was left to the appellants to do their part. This they failed to do; therefore, it seems clear to us that it was the appellants who had breached the agreement. The issues raised by the appellants are, to our mind, new issues. Firstly, the issue of the option not being valid as the second appellant did not give the option ought not to be raised at this stage. The matter had reached a stage well beyond the option stage, ie all the terms of the sale and purchase had been agreed to by both parties. What needed to be done is only for the appellants to execute the sale and purchase agreement. Secondly, the issue of vacant possession too does not arise as this issue was never an issue. It was never raised by the appellants at the negotiation stages nor was it raised at the time when both parties finally agreed on the terms when the respondent executed the four copies of the agreement. Up to this stage, there was no evidence at all that the appellants did not agree to sell the property to the respondent.

At the appeal, learned counsel for the appellants argued that even if this court holds that a binding contract had come into effect, the respondent was still not entitled to specific performance. He argued that the agreement was entered on 15 December 1993 and it allowed for the balance of the purchase price to be paid within four months from the date of agreement with an extension of two months with interest at 10% per annum. However, he contended that the minute of the judgment provides that the balance of the purchase price was to be paid four months from the date of the order with an extension of two months without interest. He further contended that even up to the date of the hearing, the respondent had not paid the balance of the purchase price. Therefore, he claimed, the respondent was not entitled to specific performance. We find no merit in this line of argument. As to why the respondent could not pay the balance of the purchase price up to the hearing of the appeal is quite obvious. On the appellants' application, the High Court had granted a stay of execution. As to the four months mentioned in the agreement, this too could not be carried out since the appellants refused to sign the contract. What, therefore, was the date for the respondent to pay the balance of the purchase price? Time began to run from the date of the contract but the respondent could not perform or complete the contract, firstly because the appellants refused to sign it and secondly, after the respondent had obtained judgment, there was a stay order. If the contract had been signed by the appellants, then the stipulated time has to be followed as there existed a fixed time to complete the contract. Furthermore, by agreeing that the contract was entered on 15 December 1993, the appellants should not blow hot and cold by now saying that there was no contract between the appellants and the respondent.

We are of the same view as the learned judge of the High Court that in the circumstances of this case, a contract between the appellants and respondent had indeed come into effect on 15 December 1993; and since the appellants had refused to sign the contract, they have breached the contract and therefore, the respondent is entitled to specific performance. We therefore dismissed the appeal with costs and made the following

orders: the appellants to sign the sale and purchase agreement one month from the date of this order and all the times mentioned in the minute of judgment shall begin to run after the date of the signing by the appellants. The extension of two months shall be with interest at 10% per annum. We also ordered that the costs in the court below be on a chamber hearing basis and the deposit is to go towards taxed costs.

Appeal dismissed.

Reported by Loo Lai Mee